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Tagore Law Lectures—1894.

THE LAW OF FRAUD,

MISREPRESENTATION AND MISTAKE

IN

BRITISH INDIA.

BY

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PREFACE.

THE shortness of this volume, as it appears in print, seems to call for a word of explanation. It is due to the fact that I have treated at some length, in other published works, of the doctrines of English law which are the foundation and indeed the substance of the Anglo-Indian law considered in these Tagore lectures. Repetition of what I had already published, with or without some colourable disguise of form, would not have been a proper fulfilment of the duty I had undertaken to the University of Calcutta. Further and fuller exposition of the English rules as developed in recent English decisions would on the other hand have been of little use to Indian students, whom I could not safely assume to have more than an elementary knowledge of the subject. On the whole the most profitable method was to be sought, as it appeared to me, first in re-stating the settled principles in the simplest and broadest manner consistent with accuracy, and then in reviewing such parts of the Anglo-Indian Codes as embody those principles, and the decisions of the Indian High Courts on the Codes and on the general law. The main purpose has been to produce an introduction which may be found intelligible by students; at the same time I hope that practitioners in Indian Courts may find my work of some use as a clue to the authorities.

In this hope I am to some extent encouraged by the singularly defective state of the books of reference available in a search for Indian decisions. Although there has for many years been an official system of law reporting in all the High Courts, the only digest of cases is now five years in arrear, and there is no kind of supplement or current index, official or unofficial. Annotated editions of the Codes exist, but with very few exceptions are so meagre and irregular in their references to

adjudged cases as to be almost useless in that respect. In fact, no one can at present be sure of knowing what Indian decisions have been reported on any given point unless he has read or at least searched the whole of the Indian Law Reports for five years past. I must confess that I have not attempted any such feat, and that I should have been in danger of overlooking important cases of the last few years but for the frequent and ready help of my predecessor in office, Mr. Caspersz, and other learned friends of the Calcutta Bar, to whom I hereby return my best thanks. Fortified by that help, I venture to think that such collection and classification of Anglo-Indian authorities as I have been able to make will not be without practical utility within its range.

The book is offered as a book, not as a report of lectures; it is therefore divided into chapters according to the subject-matter, without regard to the original division required by the conditions of oral delivery. But, as it is intended for Indian use, it seems proper to retain such terms as "here" and "in this country" with their original application to British India.

Names of parties have necessarily been reproduced, for better or worse, in the spelling of the report cited. The variations of method, or want of method, in the usage of the High Courts often cause the same native name to appear in two or three different forms. It would seem desirable and not very difficult to find some generally acceptable middle course between the barbarous Anglicism of Calcutta and the purism, perhaps excessive for common purposes, of Bombay.

It has been thought needless to give references to more than one set of English reports, as only the Law Reports, to the best of my knowledge, are usually referred to in India, or in fact commonly accessible even in the Presidency towns.

F. P.

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CHAPTER I.

English Law in India.

The law of British India is not a simple or uniform system. It is a composite or mixed law. And it is mixed in a way which, for seven or eight centuries—we may say, roughly speaking, from about the date of the Norman conquest—has ceased to be familiar in Europe. Nowadays, Europeans think of law as something determined by place, something which a man must take as he finds it in this or that country. We expect the courts of a civilized country to administer the same rules to all persons subject for the time being to their jurisdiction, of whatever nation and kindred they be. This expectation is not recognized in the East, except where European authority or influence has introduced it. Nay more, it is reversed.

Law of British India still not uniform.

Asiatic law is still essentially personal, not territorial. A man does not find law where he goes; he carries his own law with him. It was so in Europe all through the early Middle Ages. There was nothing anomalous in the early position of the East India Company's settlements as insulated

Asiatic law is personal.

regions of English law in India. Continental merchants, Lombard and Hanseatic, had been in the same position in England down to the 16th century. Yet in the first half of the 19th century this medieval conception of personal law, which is still in full force in the East, had so completely passed out of men's minds that Lord Brougham actually thought India was divided into territories of Hindu, Mahometan, and Buddhist law. He said, describing the variety of laws existing in different parts of the British Empire :—

"In our Eastern possessions these variations are, if possible, greater; while one territory is swayed by the Mahometan law, another is ruled by the Hindu law; and this, again, in some of our possessions is qualified or superseded by the law of Buddha, the English jurisprudence being confined to the handful of British settlers, and the inhabitants of the three Presidencies."[1]

This statement, like others of Lord Brougham's, was curiously and laboriously inaccurate. Asiatic laws and customs know nothing of this neat and exclusive geographical parcelling. So far as there is any one dominant law in this or that Indian State, it is dominant, not as the law of the land, but as the law of the ruling dynasty or clan. The reference to "the law of Buddha" would seem to signify that Lord Brougham had been told the

[1] Speeches, Edin. and Lond. 1838, vol. ii. p. 357; Cowell's Tagore Lectures, 2nd ed. 148.

Burmese were Buddhists, and assumed that at one time they must have been some sort of Hindus. As the first Burmese war was still recent, Lord Brougham's survey would have been incomplete without a few words to show that Burma had not escaped his omniscience.

Personal and public Law.

The received Asiatic principle, so far as there is any principle, appears to be that, except in matters of State revenue and other public service, and except in criminal jurisdiction over offences condemned in all systems of justice, every man is governed by his own personal law, whatever that is. Hence the Imperial Government's policy of impartially respecting all customs consistent with public order, and not manifestly repugnant to existing rules of morality common to all civilized nations, is not only just and expedient in itself, but strictly in accordance with all Asiatic tradition of good government.

Such was, before our time, the policy of Akbar, the wisest of Her Majesty's predecessors on the throne of India; an Asiatic Prince with a systematic genius for government and enlightened ideas of toleration which put him not only above other Asiatic rulers, but above most European Princes of his time. India has many holy places: Akbar's tomb at Sikandarah, where Hindu, Musalman, Sikh, and Englishman can alike bow the head in reverence for a great and just man, is perhaps the holiest of all. While Europe was dis-

tracted by religious wars, Akbar was framing his splendid dream—a dream, but still splendid—of the Tauhid-i-Iláhi. But even Akbar could not substitute an imperial for a personal rule in matters of faith and custom. His illustrious failure was hardly needful to teach us that such an attempt is beyond human power. We have not only foregone it, but pledged ourselves against anything of the kind. If change comes, as in fulness of time it may, it must come of itself.

Imperial departments of British Indian law.

The law of British India is, in principle, still a system of personal laws, with a certain number of departments in which general Imperial laws have been introduced, either by express legislation or by judicial usage. Those departments are important and extensive; they are in course of being further extended. But there is still no general law of British India in the sense in which there is a general law of England or France or Italy.

What, then, are these Imperial departments? Broadly speaking, they are Criminal Law, Commercial Law, and what may be called the individualist parts of Civil Law. They answer pretty much, apart from Criminal Law, to what English lawyers call collectively the "law of personal property," omitting, however, all that has to do with succession to property on the owner's death. To these we have to add the whole law of Procedure and certain legislation (of which the chief example is the Succession Act) provided for the benefit and ease of people not under any recog-

nized personal law. These heads of general law, which constitute, so far as they extend, an inchoate Common Law of British India,[1] have been created in two kinds of ways :—

1. Direct legislation, notably the body of statutes known as the Anglo-Indian Codes.

2. Judicial introduction of English law where no other specific rule is applicable.

Legislation

We have no occasion to dwell here on the legislative powers and machinery of the Government of India. The Imperial Parliament is the ultimate source of all legislative authority now exercised in British India, and the principal Imperial statute now in force on the subject is the Indian Councils Act, 1861, with the earlier enactments which it confirms. We shall have to consider in more or less detail various parts of the Anglo-Indian Codes, and more especially the Contract Act (IX. of 1872).[2]

The judicial introduction of English law calls for some further remark.

Judicial introduction of English law.

The statutory and specific jurisdiction of the old Presidency Courts to administer English law expressly as such was confined to British subjects, whoever might be included in that description.

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[1] The Common Law itself was originally the law of the King's courts, not excluding a variety of local and even personal customs. The peculiar conditions of England enabled the King's judges and ministers to develop the primacy of the King's law into exclusive sovereignty much sooner than in other European countries.

[2] As to the application of the Contract Act to all persons in British India, notwithstanding anything in earlier Acts and charters, see *Madhub Chunder Poramanick* v. *Rajcoomar Das* (1874), 14 B.L.R. 76.

The power to administer the same justice in civil matters to all sorts of people within the jurisdiction seems to go back to Regulation III. of 1793.[1] The material sections are as follows :—

Ben. Reg. III. of 1793.

S. 7. All natives, and other persons not British subjects, are amenable to the jurisdiction of the zillah and city courts.

S. 8. The zillah and city courts respectively are empowered to take cognizance of all suits and complaints respecting . . . . debts, accounts, contracts, partnerships . . . . claims to damages for injuries, and generally of all suits and complaints of a civil nature, in which the defendant may come within any of the descriptions of persons mentioned in Section 7.

S. 21. In cases coming within the jurisdiction of the zillah and city courts for which no specific rule may exist, the judges are to act according to justice, equity, and good conscience.

It will be observed that even this was still applicable only to "natives and other persons not British subjects." The Regulation was finally repealed by the Bengal Civil Courts Act (VI. of 1871), which, however (S. 24), substantially re-enacts the provision in question.

"Equity and good conscience" had already appeared in the Charter of 1683, but this was confined to the Company's own people. It was a

[1] This Bengal Regulation was soon afterwards copied in the other Presidencies.

regulation only for the local and personal jurisdiction, in fact it was of the medieval type of which we have already spoken. We now have to see what was meant by the "justice, equity, and good conscience" prescribed in the Bengal Regulation as the general guide in cases of doubt.

"Justice, equity, and good conscience."

Let it be remembered that "natural" justice has never existed, and cannot exist, in a civilized country. It is not compatible with either certainty or equality in the administration of justice—perhaps the two most fundamental qualities of civilized law. One of the first demands of men living in any settled form of society is for a rule of law to secure them against mere caprice on the part of those in authority. They expect the decisions of the magistrates to be guided by some sort of fixed principles; that is, justice must at least aim at being certain. Likewise they expect the magistrate not to show arbitrary favour or disfavour to persons. There may be, in Eastern countries there always have been, different rules for different classes and conditions of men, but within the same class the rule has to be the same for one person as for another. Justice must at least aim at being equal. The really natural justice for Englishmen governing in India was to follow the rules they were best acquainted with. The only "justice, equity, and good conscience" English judges could and did administer, in default of any other rule, was so much of English law and usage

as seemed reasonably applicable in this country. Hindu and Mahometan law not affording any specific rules, or certainly none that were practicable for a mixed population, in a large part of the common affairs of life outside religion and the family, there was only English law to guide them. Thus the law of civil wrongs (among other branches) was practically taken from the common law of England; just as, if Germans had been set to do similar work, their basis would have been the Roman law received in modern German practice. We did profess in the mofussil, for a considerable time, to administer Mahometan criminal law. Macaulay's introduction to the first draft of the Penal Code records the difficulties of the attempt.

I have said that part of our subject-matter is covered by the Contract Act. But this Act only states in authentic form the results of exactly the same judicial process applied to the law of contract. Hence, we have to do strictly and wholly with Anglo-Indian law. Such principles or results as may be found in Hindu or Mahometan books are matter of pure ornament and curiosity.

Authorities on position of English law in British India.

The question to what extent English law has been received in British India, so as to become a law generally binding, is not without illustration from authority. It was much discussed in 1836, in *Mayor of Lyons* v. *East India Co.*[1] (the case of General Martin's charitable foundation at Luck-

[1] 1 Moo. Ind. App. 175; 3 St. Tr. N.S. 647.

now). Although the decision itself was limited to holding that certain specific parts of the English jurisdiction of the law of property were not and never had been binding in the jurisdiction of the Supreme Court of Bengal, the reasons given, and the arguments which prevailed, involve the conclusion that English law has never been imported into India as a whole; and that whatever parts of it are applicable must be so by virtue of some express legislation or specific principle appropriate to the matter in hand.

In a later case[1] an agreement had been made within the local jurisdiction of the Supreme Court of Madras, and as to land in the Presidency beyond those limits, between parties of whom some were Hindus, some Mahometans, one an Englishman, and one, it seems, an Armenian, and it was not shown that these parties had contracted with reference to any particular law. The Judicial Committee held that they could only be presumed to have contracted according to English law, being the law of the place where the contract was made, and not being inconsistent with any special local law of the place where the property in question was. This judgment was said in the High Court of Bombay, a few years later, to be "an authority of the highest Court of Appeal that, although the English law is not obligatory upon the Courts in

[1] *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (1862) 9 Moo. Ind. App. 303, 321.

the mofussil, they ought, in proceeding according to justice, equity, and good conscience, to be governed by the principles of the English law applicable to a similar state of circumstances."[1] With great respect for the learning and discretion of the Bombay Court, I am unable to see that the authority, as a positive authority, goes to any such extent. But I have already endeavoured to show that the "justice, equity, and good conscience" of the old Regulations could not in practice, if there was to be any settled system of justice, mean anything else than the analogies of English law. Doubtless, it was convenient that this reasonable and necessary tendency should, in course of time, be explicitly approved by a superior court; and the approval does not lose much, if anything, of its intrinsic value by professing to rest upon a judgment of the ultimate court of appeal which was really of less general scope.

The historical fact, in any case, was quite explicitly recognized not long ago in the Judicial Committee, where it was said that "equity and good conscience" had been "generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances."[2]

NOTE.—The preface to Smoult and Ryan's "Rules and Orders of the Supreme Court of Judicature at Fort William in Bengal,"

[1] *Dádá Honáji* v. *Bábáji Jagushet* (1865) 2 Bom. H.C. 38.

[2] *Wághelá Rájsinji* v. *Sheikh Masludin* (1887) L. R. 14 Ind. App. 89, 96; I. L. R., 2 Bom. 551, 561.

Calcutta, 1839, p. ix, gives a list, taken from an earlier preface by Mr. Longueville Clarke, of all the heads to which the law administered by the old Supreme Court may be referred. The introduction of English law, common and statute, so far as Europeans are concerned, and within that jurisdiction, is attributed to the United East India Company's Charter of 1726, and this is stated to be the received opinion. And see Cowell's Tagore Law Lectures, 2nd ed. p. 13, and Sir James Stephen's "Nuncomar and Impey," vol. ii., ch. 9, where the introduction of English criminal law is discussed.

The case of *Borrodaile* v. *Chainsook Buxyram*, Hyde's Bengal High Court Reports, 51, where this list is cited (at p. 61), illustrates the troubles of working a system of personal laws in a modern commercial community. The Court held that it was not open to a Hindu defendant in a civil cause to rely on the Statute of Frauds; "The laws and usages of the defendant being laid down by 21 George III. c. 70, s. 17, as the rule to be followed in causes 'where only one of the parties shall be a Mahometan or Gentû.'" This was not quite ten years before the Contract Act superseded all reference to personal laws in matters coming within it, and abrogated the Statute of Frauds altogether for British India so far as relates to suits on contracts.

Discussion of the "substantive law to which all persons in the mofussil not subject to Hindu or Mahometan civil law should be subject" may be found in the Special Reports of the Indian Law Commissioners, Parl. Papers (H.C.), 30 May, 1843, B. No. vii. The conclusion of the Commissioners, after an elaborate review of the history and authorities, was that "so much of the law of England as is applicable to the situation of the people," and not inconsistent with express legislation, was and ought to be the *lex loci* of the mofussil. This report (which ignored the fundamental difference already pointed out between Asiatic and modern European ideas of law and jurisdiction) does not, of course, possess any legal authority. An attempt made in 1845 to carry out its recommendations by an Act was ultimately abandoned.

CHAPTER II.

FRAUD.

A.—OF FRAUD IN GENERAL AND ITS REMEDIES.

Civil not criminal law to be mainly dealt with.

WE have seen reason to expect that the law we have to deal with in this course will in the main be English law, in whatever form it may have been produced and have become authoritative in England; whether it was laid down in the exercise of ordinary jurisdiction by the old Courts of Common law, or developed under the jurisdiction, originally an extraordinary and as it has been called supra-legal one, of the Court of Chancery,[1] or defined and enlarged in recent years by the Supreme Court in which the formerly separated powers of common law and equity have been united since 1875. But it is not English law pure and simple. It is Anglo-Indian law, the law of England as received in British India, as applied in the first instance exclusively by the English Courts of the Presidency towns, and afterwards more generally,

[1] For the historical study of the laws of England it has to be remembered that other Courts besides the Court of Chancery acquired equitable jurisdiction in various ways. The "equity side" of the Court of Exchequer is the most important example. It is needless to dwell on this for the present purpose, or to analyse the elements of the jurisdiction exercised by the old Supreme Courts in India.

though still under their guidance, and as defined and modified by the Codes during the generation which has elapsed since the direct government of India was assumed by the Crown in Parliament. The Contract Act and the Specific Relief Act are the Indian statutes to which we shall especially have to attend. It is true that considerable parts of the Penal Code are more or less concerned with our subject. Mistake, as such, is evidently not among the matters which call for penal justice. Neither is Misrepresentation, save so far as it is accompanied with some form of Fraud. But Fraud, in many of its forms, operates in every civilized system of law, not only to discharge private obligations and give rise to private rights of suit for compensation or restitution, but to render the persons guilty of it liable to prosecution at the hands of the State, and the consequent punishment appointed for the offence in each case. Thus, in a large sense, the law of Fraud in British India may be said to include the offences dealt with by nearly thirty sections of the Penal Code (Chap. XVII., ss. 378-382 and 403-424). Nevertheless, I do not think it would be profitable for us to dwell to any great extent upon Fraud in its criminal aspect. The law of Fraud, as the term is commonly used in the profession at home and in America, is not understood to include the purely criminal law of Theft and allied offences. In fact, the part of civil law which is

most intimately connected with the questions arising out of that class of offences, and most necessary for their solution, is that which relates to Possession and Property rather than to Obligations; and there would be no great difficulty in justifying from a strictly scientific point of view the division which has been adopted for practical convenience by text-writers on both sides of the Atlantic. As regards British India, such peculiar conditions as exist in our case appear not to suggest any departure from this established usage, but rather to enhance the reasons for adhering to it. The Penal Code has been well and abundantly commented on by several learned authors. We may regret that so much of the extreme technicality of the Common Law was retained by its framers as we meet with in some of the definitions, and we may hope that greater simplicity will be attained in some future revision; yet the Code, so far as I am informed, is found in practice to work smoothly enough, and can well bear comparison with any other Code of equal magnitude in the fewness of the substantial doubts it has raised. On the whole, therefore, it seems advisable to consider the effects of fraud and the like chiefly with reference to civil rights and duties.

Fraud: difficulties of legal definition. Process of English equity.

Fraud is the name of something which has been denounced, and seldom superfluously, by moralists, judges, and legislators in all ages. "He that

worketh deceit shall not dwell within my house." The "wicked balances" and the "bag of deceitful weights,"[1] or more refined equivalents, are still to be heard of wherever business is done. Yet it has been found most difficult to define for legal purposes what Fraud really is. Escaping the coarser meshes of the old forms of action provided by the Common Law, it has been hunted out of one refuge after another by the refined ingenuity of English equity lawyers. As in the case of all innovations dictated by high-strung zeal for righteousness, the innocent have now and then suffered with the guilty. Persons who had acted with the best intentions and according to the best of their lights have found themselves answerable for commissions and omissions which were "in the eyes of the Court" equivalent to fraud. The severity of the English Courts in dealing with such persons in certain classes of cases, and especially with trustees, was, however, not due merely to excess of logical refinement in the application of the larger principles. In substance it was an endeavour, a generous one even if too ambitious, to maintain the highest possible standard of integrity and diligence in the execution of duties involving special confidence between man and man. At this day we have learnt a bolder and simpler method. Our Courts do not shrink from stating in affirmative terms what are the duties which they consider to

[1] Micah vi. 11.

attach to an office or undertaking once voluntarily assumed. Whatever is done or omitted against the rule is then a ground of liability, and for the practical purposes of men's affairs it matters little by what name the breach of duty is called. We no longer arrive at the conception of a trustee's or executor's duties by the circuitous method of saying that such and such must be the duty because the act or omission complained of is more or less remotely analogous to other acts of people in other situations which have been held to be fraud. But it was the enlargement of lawyers' ideas through the tentative and artificial process of equity jurisprudence which prepared the broader and straighter ways now open to us. That process was complicated by historical accidents of jurisdiction and procedure with which Indian students have little occasion to trouble themselves. Only it is good to remember that the persistent refusal of the Court of Chancery to define Fraud, which has become a commonplace in the modern books, does not signify any love of vagueness for its own sake, or any desire to exercise mysterious and arbitrary power. It was a precaution not only against the ingenuity of persons minded to keep themselves just on the windy side of the law, but against another sort of ingenuity, that of jealous and vigilant competitors for business; against unscrupulous ambition within the profession, and sometimes against the hostility of sincere but ignorant partisans in politics.

General notion of fraud or deceit.

Fraud may be described, for most usual purposes, as the procuring of advantage to oneself, or furthering some purpose of one's own, by causing a person with whom one deals to act upon a false belief. This is not a definition; we shall see that it is not an adequate description, for there may be fraud without any seeking of personal advantage. In fact, a short definition is not possible. Every part of the conception requires analysis and development. This we shall endeavour to supply, as occasion arises, in the following pages. Moreover, there are practices which, though constantly on the verge of actual deception, and often including it in fact, are such as make the full proof of the facts exceedingly difficult. A person who has been brought into a chronic state of dependence upon another who has no lawful claim to his obedience or moral claim to his bounty, a state that is in truth one of chronic illusion and deception, cannot be said to have been deceived on one occasion more than another. Hence the doctrine of what we know in England as Undue Influence has received extensions and refinements which indeed are artificial; which in some cases have endeavoured, perhaps, to make a closer approximation to perfect justice than is allowed to the instruments at the disposal of human tribunals; but which err, if they have erred, on the nobler side. A rude condition of society needs broad and plain rules

enforced, if possible, by swift and impressive execution.[1] When men's affairs have become complex, when the hands of the law are in the main too strong to leave much hope to violence, the time comes for evil-doers to take refuge in subtle devices and circumventions. Then it is better for the law to take the risk of being over-subtle than to acquiesce in being ineffective.

Remedies: restitution or compensation.

Considered with respect to the remedies that can be applied, Fraud has, like other civil wrongs, a double aspect. We may aim at specific relief or restitution, the replacing of the party who has been wronged in the position he would have held if the fraud had not been committed, with the rights and lawful advantages incident to that position, and of which he has been deprived, or would have been deprived if the fraud had not been discovered in time, and the appropriate process of law set in motion. Right will then be done by undoing the wrong so far as possible. A judgment ordering the repayment of purchase-money in exchange for the reconveyance of immoveable property which the vendor has passed off on the purchaser by fraud may be taken (in England at any rate) as a typical and important example of this procedure. The

[1] In point of fact this condition is seldom fulfilled in a half-civilized commonwealth, save now and again under an exceptionally vigorous ruler, such as Ranjit Singh.

converse case of a fraudulent seller being held to "make his representation good," as the phrase goes, is specially dealt with in the Indian Contract Act (s. 19). But this, as we shall see presently, is not a special remedy against Fraud. Again, the simple and unqualified restitution of gifts obtained by fraudulent practices has often been decreed. Except in this last-mentioned class of cases, the advantage which has been unduly taken has generally been taken under the form of a contract; sometimes, though rarely, under the mere pretence of it; so that, for example, an apparent seller of goods has never ceased to be the true owner even as against innocent third persons. Accordingly the Court has to decide sometimes whether there is any true contract at all, often whether a contract which has really been made is conclusively binding on the party seeking relief. And where this has to be done, it must be done before any question as to the proper manner and conditions of restitution can be entertained. Hence the rules which govern the rescission of contracts really govern, to a large extent, the law of specific restitution as a remedy applicable to cases of Fraud. Provisions as to the rescission of contracts have, therefore, an appropriate place in the Specific Relief Act. Those provisions,[1] as I read them, do not alter the substance of the doctrine received in England and other juris-

[1] Act I. of 1877, ch. iv., ss. 35—38.

dictions where the Common Law is in force. They are stated to be taken for the most part from the draft Civil Code of New York,[1] an ambitious and unsatisfactory composition which has had an evil influence on the Indian Codes in more than one place; but in this case, although the workmanship would not for a moment pass muster either in the Parliamentary Counsel's Office or in any good conveyancer's chambers in England, I do not think the New York codifiers have succeeded in introducing any blunder or confusion which cannot be rectified by reasonable judicial interpretation.

Specific relief an *equitable* remedy in England: *damages* in common law jurisdiction.

The form of redress we have just spoken of was fostered and developed in the jurisdiction of the Court of Chancery. Quite distinct from this was the remedy almost exclusively administered by the Courts of Common Law, the King's Courts, whose seat was fixed at Westminster, and whose rules had become technical long before the relief given by the Chancellor was commonly thought of as a regular part of the judicial system, or allowed by the king's ordinary judges to be anything but a branch of his extraordinary prerogative, and a branch whose growth should be rather jealously watched. Not restitution but compensation, not specific relief but the award of damages in money, was the usual remedy administered by courts of common law jurisdiction, as indeed it still is. We

[1] Whitley Stokes, the Anglo-Indian Codes, i. 974.

need not stop to mention the exceptional cases in which the old Superior Courts of the King's Bench, Common Pleas, and Exchequer, had an original power of issuing direct and specific orders. They did not occur in the ordinary course of civil proceedings,[1] and do not require our attention, so far as I am aware, for any purpose connected with the present subject. Broadly speaking, damages are the normal and only remedy available in a Court administering English common law as distinct from equity, and not having acquired enlarged powers either by the addition of equitable jurisdiction in general terms, or by more specific enactments. Damages are, so to speak, an *ex post facto* remedy. They are not intended to satisfy the successful plaintiff by restoring the state of things which existed before the wrong was done, but to make up to him the amount by which he is actually the worse off in consequence of the defendant's wrongful act. Commonly these two modes of computation will work out to identical results, or to results which cannot be distinguished for any practical purpose. But they sometimes lead to palpably different results. Thus, where a tenant has wrongfully removed part of the soil from his holding, the measure of damages is not the cost of restoring the ground to its former con-

[1] *Cf.* Pollock on Torts, 3rd ed. 166, *n.*

dition, but the extent to which the value of the landlord's interest in the land is diminished.[1]

Compensation in damages the normal form of redress in English law.

It is material to notice that even in the view of an English court of equity compensation in damages is the natural and normal form of redress. The constant maxims of the Court of Chancery, derived from the historical conditions under which its jurisdiction had grown up, was that specific relief should not be granted where the relief in damages was adequate; and the Specific Relief Act, in s. 21 (*a*), has expressly confirmed this rule for British India. In some European countries, notably Germany,[2] where the history of law and procedure has been different, the presumption is the other way, and the Courts award money damages only when specific performance or relief is impossible or inappropriate. An important consequence, in our present subject-matter, of the general English doctrine of legal redress is that there is no actionable fraud without proof of actual damage, that is, of harm or loss on which an appreciable money value can be set. An action of deceit for nominal damages is not known to English, nor therefore to Anglo-Indian law. It is a wrong to damage one's neighbour by deceit, but

[1] *Whitham* v. *Kershaw* (1886) 16 Q. B. Div. 613.

[2] In France the property in immoveables as well as moveables passes at once by the contract of sale. Specific performance, as we understand the term, is therefore not required in ordinary cases.

there is not any absolute right not to be deceived in the sense in which there is an absolute right not to be defamed. This last-mentioned right is itself of comparatively recent origin, and is something of an anomaly in English law. Perhaps it may be a fair subject of discussion whether it be on the whole a beneficial one either at home or in British India.

Practically we have: Suit for damages; suit for rescission; special defences to suit on contract.

On the whole, therefore, the form in which fraud is complained of in a civil court of justice either at home or in British India, will in the great majority of cases be either an action for damages, or an original suit to set aside a contract alleged to have been obtained by fraud, or a special defence, on the ground of fraud, to a proceeding in which the other party is seeking to enforce the contract.

The rules applicable to such proceedings are in truth, to a great extent, examples of broad principles which govern not only these but other classes of cases, and which, when they are once fully grasped, may be perceived to be simple, and indeed to be necessary, under one form or another, in any system of law that aims both at the repression of dishonesty and at the exact performance of just obligations. On the one hand fraud must be made unprofitable; on the other hand innocent parties are not to be disappointed of their lawful and reasonable expectations because other persons have committed frauds. The complete and concurrent attainment of both these ends is a counsel